IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 15TH FEBRUARY 2007 / 26TH MAGHA 1928

RSA.No. 142 of 2006()

A.S.169/99 OF III ADDL. DISTRICT JUDGE, KOLLAM
O.S.258/92 OF ADDL. SUB COURT, KOLLAM

APPELLANT/RESPONDENT/DEFENDANT:

BISMI MANZIL, KUTTICHIRA,
KALLUMTHAZHAM, KILIKOLLOOR VILLAGE.

BY ADV. SRI.S.ABDUL RAZZAK

RESPONDENTS/APPELLANTS/PLAINTIFFS
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1. BEEMA BEEVI, W/O. ABDUL KHADER,
KARICKOTTU PULIYATHUTHAZHATHIL VEEDU,
KILIKOLLUR, KOLLAM.

2. NAJEEMA, D/O. ABDUL KHADER,
KARICKOTTU PULIYATHUTHAZHATHIL VEEDU,
KILIKOLLOOR, KOLLAM (ORIGINAL PLAINTIFF).

BY //

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 15/02/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

R.S.A .NO.142 OF 2006

Dated 15th February 2007

J U D G M E N T

Appellant is defendant in O.S.258/1992 on the file of Additional Sub court, Kollam. Respondents are plaintiffs. First respondent is the widow and second respondent the daughter of deceased Abdul Kadar. Respondents instituted the suit for realisation of Rs.21,000/- due to deceased Abdul Khadar. It was contended that towards the amount due to deceased Abdul Khadar, appellant issued Ext.A2 cheque drawn in State Bank of Travancore, Mayyanad branch dated 20/9/1991 and in spite of sending Ext.A3 lawyer notice the amount was not paid. Appellant filed a written statement contending that under Ext.B1 agreement dated 20/6/1991 deceased Abdul Khadar had transfered his hotel business to the appellant for a consideration of Rs.46,000/-. Out of Rs.25,000/- was paid and for the balance of Rs.21,000/- Ext.A2 cheque was handed over as security on condition that it is to be paid before 20/9/01 and out of that amount Rs.6,000/- was paid

on 12/7/1991 and Rs.5,000/- on 4/8/1991 in the presence of mediators and subsequently he could not pay balance of Rs.10,000/- and he wanted to transfer the business but Abdul Khadar insisted that Rs.10,000/- should be paid before transfer and accordingly Rs.10,000/- was paid on 20/9/91 and when the cheque was directed to be returned it was told that the cheque was misplaced and as the transaction was closed the cheque was not presented appellant is not liable to pay any amount and therefore respondents are not entitled to decree sought for. Learned Sub Judge framed necessary issues. On the evidence of PW1 and Exts.A1 to A4 on the side of plaintiff and Dws.1 and 2 and Exts.B1 to B3 on the side of defendant, learned Sub Judge on appreciation of evidence found that plaintiffs have not pleaded anything about the agreement and evidence of PW1 shows that she was ignorant about transaction and held that plaintiffs are not entitled to the decree sought for suit was dismissed. Plaintiffs challenged the decree and judgment before District court, Kollam in A.S.169/99. Learned Additional District Judge on reappreciation of evidence found that Ext.A2 cheque was issued by appellant pursuant to Ext.B1 agreement and what was contended by appellant was that the amount

due under the agreement was discharged on the respective dates shown in the written statement and the evidence was not properly appreciated by trial court. Learned District Judge on reappreciation of evidence found that plaintiffs are entitled to the amount due under Ext.A2 and granted a decree for realisation of the same as sought for. This appeal is filed challenging the said judgment.

2. Learned counsel appearing for appellant was heard. Arguments of learned counsel appearing for appellant was that learned Sub Judge had advantage of noting the demeanour of the witnesses examined and on appreciation of evidence it was found that evidence of PW1 is unreliable and evidence of Dws.1 and 2 is reliable and in such circumstances, learned Additional District Judge should not have substituted his opinion on the oral evidence to enter a different finding. It was argued that as per Ext.B1 agreement balance amount due has to be paid before 20/9/2001 and the last payment was made by appellant before that date and evidence shows that Abdul Khadar was hospitalised and because of the relation between them receipts were not obtained for payment of the amount due and this was appreciated by learned Sub Judge properly and learned

Additional District Judge should not have taken another view on the appreciation of evidence and therefore appreciation of evidence by learned District Judge was perverse and therefore decree passed by learned Sub Judge is to be restored.

3. It was also argued by learned counsel appearing for appellant that when there was no specific pleading as to how the amount was due to deceased Abdul Khadar and nothing was mentioned about the agreement and evidence of PW1 disclosed that she does not know anything about the transaction though she claims that she knows the transaction, learned District Judge should not have interfered with the findings of learned Sub Judge.

4. On going through judgments of courts below, I cannot accept the arguments made by learned counsel appearing for appellant. It is true that in the plaint details as to how the amount due under Ext.A2 to deceased Abdul Khadar was not pleaded. But it was pleaded that towards the amount due Ext.A2 was issued. The written statement filed by appellant makes it clear that the hotel business which was being conducted by deceased Abdul Khadar was transfered under Ext.B1 agreement to appellant for a total consideration of

Rs.46,000/-. While fixing the consideration Rs.11,000/- was fixed as the value of furniture and equipments of the hotel. It was deducted from total consideration of Rs.46,000/-. Out of the balance of Rs.35,000/- Rs.25,000/- was paid on the date of the agreement. The balance payable was Rs.21,000/-. It also shows that Rs.25,000/- was paid on the date of execution of Ext.B1, namely 20/6/1991 and Ext.A2 cheque was handed over for the balance. Agreement also shows that towards the payment of Rs.21,000/- Ext.A2 cheque was issued with a stipulation that the amount is to be paid before 20/9/1991 and Ext.A2 cheque is dated 20/9/1991. It is thus clear that Ext.A2 cheque is to be operative only on the failure of appellant to pay Rs.21,000/- before 20/9/1991. Written statement also prove that the transfer made under Ext.B1 was complete came into effect and appellant conducted the business thereafter. In the written statement appellant also contended that after paying Rs.11,000/- on two occasions viz. Rs.6,000/- on 12/7/1991 and Rs.5,000/- on 4/8/1991 appellant requested permission of deceased Abdul Khadar to transfer the building and as insisted Rs.10,000/- being the balance was also paid on 20/9/1991. Ext.B1 agreement prove that Rs.21,000/- was

to be paid to deceased Abdul Khadar on or before 20/9/1991 and towards that payment Ext.A2 cheque was issued as security. Therefore the absence of pleading as to how the amount was due, in the plaint is not very material.

5. As rightly found by learned District Judge, having admitted liability to pay Rs.21,000/-, question is whether appellant has established the discharge pleaded by him. Case of appellant was that on 12/7/1991 he paid Rs.6,000/- and on 4/8/1991 he paid Rs.5,000/- and the balance of Rs.10,000/- was paid on 20/9/1991. Learned counsel pointed out that Ext.A2 cheque is dated 20/9/1991 and it was on that day Rs.10,000/- was paid and therefore the amount due under Ext.B1 agreement was discharged and therefore no amount was due to deceased Abdul Khadar and that is why Abdul Khadar did not present the cheque or initiate action during his life time. It was also argued that period of the payment had expired before the death of Abdul Khadar and fact that he did not present the cheque for encashment or take action justifies the finding of learned Sub Judge.

6. Learned District Judge on reappreciation of evidence found that evidence of DWs.1 and 2 with regard

to the discharge cannot be relied on. When Ext.B1 agreement specifically shows that Ext.A2 cheque was handed over and mandates that the amount covered under the cheque is to be paid before 20/9/1991, if appellant had paid the amount on the respective dates alleged or on any other dates, he would have definitely obtained a receipt from the deceased. Though DW2 was examined and appellant tried to establish the oral discharge, learned District Judge on reappreciation of evidence found that the evidence is unreliable and there is no acceptable evidence to prove the discharge. Apart from pointing out that the case of the sale or agreement was not pleaded and evidence of PW1 cannot be believed, nothing was pointed out to differ with appreciation of evidence by learned District Judge. The finding of First Appellate court that evidence of Dws.1 and 2 do not establish the oral discharge pleaded is a finding of fact. A finding of facts, however erroneous cannot be disturbed in second appeal. Substantial question of fact is not substantial question of law. This court in exercise of the powers under Section 100 of the Code of Civil Procedure cannot substitute the opinion of the first Appellate court unless it is found that the conclusions drawn by the courts below were contrary to

the mandatory provisions of law applicable or its settled position on the basis of pronouncement of the Apex court or was based on inadmissible evidence or arrived at without evidence. On going through the judgment of the First Appellate court and the arguments of learned counsel I find that no substantial question of law is involved in the appeal.

Appeal is dismissed.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.